

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE	)	
	)	
v.	)	ID No. 0601000601
	)	
KEVIN CUFF,	)	
	)	
Defendant.	)	

Submitted: January 22, 2010  
Decided: April 28, 2010

**On Defendant's *Pro Se* Motion for Postconviction Relief. DENIED.**

**ORDER**

John A. Barber, Deputy Attorney General, Wilmington, Delaware 19801.

Kevin Cuff, James T. Vaughn Correctional Center, 1181 Paddock Road, Smyrna, Delaware 19977. *Pro se*.

**CARPENTER, J.**

On this 28<sup>th</sup> day of April 2010, upon consideration of Defendant's *pro se* Motion for Postconviction Relief, it appears to the Court that:

1. Kevin Cuff ("Defendant") has filed a *pro se* Motion for Postconviction Relief pursuant to Superior Court Criminal Rule 61 ("Rule 61"). For the reasons set forth below, the Defendant's Motion for Postconviction Relief will be **DENIED**.

2. On January 23, 2006, Defendant was indicted on five counts: (1) Attempted Murder First Degree; (2) Possession of a Firearm During the Commission of a Felony; (3) Burglary First Degree; (4) Possession of a Deadly Weapon by a Person Prohibited; and (5) Criminal Mischief. The State subsequently entered a *nolle prosequi* on the criminal mischief count. A jury trial was held from July 11-13, 2006, and the jury found Defendant guilty on all charges. Defendant was then sentenced on December 18, 2006. The Supreme Court affirmed his convictions on July 24, 2007. On April 10, 2008, Defendant filed this *pro se* Motion for Postconviction Relief asserting the following grounds: (1) ineffective assistance of counsel; (2) prosecutor misconduct; and (3) due process violation as to hearsay.<sup>1</sup>

3. Prior to addressing the merits of a postconviction relief claim, the Court must first determine whether the Motion meets the procedural requirements of Rule 61(i).<sup>2</sup> This section of Rule 61 sets forth procedural bars governing the proper filing

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<sup>1</sup> Def.'s Mot. at 3.

<sup>2</sup>See *Bailey v. State*, 588 A.2d 1121, 1127 (Del. 1991); *Maxion v. State*, 686 A.2d 148,150 (Del. 1996).

of a motion for postconviction relief: (1) the motion must be filed within one year of the final judgment of conviction; (2) any ground for relief not raised in a prior post conviction motion will be barred if raised in the instant Motion; (3) any claims which the Defendant failed to assert in the proceedings leading to his conviction are barred, unless he is able to show cause for relief from the procedural default and prejudice from violation of the movant's rights; and (4) any ground for relief raised in this Motion must not have been formerly adjudicated in any proceeding leading to the conviction, unless the interest of justice requires reconsideration.<sup>3</sup>

4. While the Defendant's motion is timely under Rule 61(i)(1), the delay in addressing this motion was a result of Defendant's numerous subsequent filings. After Defendant filed this Motion on April 10, 2008, he filed a Motion for Extension of Time and a Motion for Appointment of Counsel.<sup>4</sup> On June 3, 2008 the Court denied the Defendant's request for counsel but granted the Defendant's request for an extension of time indicating that the Defendant would have an additional 45 days to respond to counsel's affidavit and the State's response once they were filed.<sup>5</sup> Defendant then filed a Motion to Amend on May 15, 2009<sup>6</sup>, which in essence requested the Court to delay ruling on the Rule 61 motion until the Defendant had an

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<sup>3</sup>*State v. Greer*, 2008 WL 1850625 (Del. Super. Mar. 4, 2008); *see also* Super. Ct. Crim. R. 61(i)(1)-(5).

<sup>4</sup> Docket Items ("D.I.") 29 and 30.

<sup>5</sup> D.I. 31.

<sup>6</sup> D.I. 36.

opportunity to file a Motion for a New Trial. Although the Court cautioned the Defendant that a Motion for a New Trial could not be incorporated into an amended Rule 61 petition, the Court decided to grant the Defendant's request and he was given an additional 90 days to file whatever additional documentation he believed appropriate.<sup>7</sup> Defendant then filed on October 13, 2009 another Motion Requesting Leave of the Court to again Amend his postconviction relief petition.<sup>8</sup> The Court again recognizing the Defendant's *pro se* status accommodated the Defendant's request by granting an additional 90 days on October 23, 2009 but cautioned it was the last continuance the Court would consider.<sup>9</sup> Lastly, on November 23, 2009 Defendant filed a request that the Prothonotary send to him certain documentation contained in the Court's file<sup>10</sup> and again, the Court accommodated the request.<sup>11</sup> This history is significant as it reflects an effort by the Court to provide the Defendant the time needed to appropriately address his claims and there have been significant accommodations made to ensure that the Defendant was given full opportunity to file the pleadings he believed were necessary.

5. After reviewing the Defendant's present Motion, this Court finds that Defendant's prosecutor misconduct and due process violation as to hearsay claims are

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<sup>7</sup> D.I. 37.

<sup>8</sup> D.I. 38.

<sup>9</sup> D.I. 39.

<sup>10</sup> D.I. 40.

<sup>11</sup> D.I. 41.

procedurally barred under Rule 61(i)(3). This section of Rule 61 bars review of claims that were not previously asserted in the proceedings leading up to the conviction, unless the defendant is able to show cause for relief and prejudice from violation of the movant's rights. This procedural default applies to cases where the defendant fails to raise the claims in a prior direct appeal to the Supreme Court.<sup>12</sup> The Supreme Court's July 24, 2007 order indicates that Defendant did not raise the prosecutor misconduct and due process violation as to hearsay claims on appeal and thus these claims are barred by Rule 61(i)(3).<sup>13</sup>

Defendant also has not shown any "cause for relief from the procedural default and prejudice from violation of the movant's rights" to lift the Rule 61(i)(3) impediment. In order to establish "cause," a showing of some external impediment that prevented defendant from constructing or raising the claim is required.<sup>14</sup> In his motion, Defendant indicates that the grounds listed were not previously raised because Defendant "was not fully aware of all constitutional violation[s]."<sup>15</sup> However, it has previously been held that lack of knowledge as to one's rights does not constitute "cause."<sup>16</sup> Furthermore, Defendant's claims merely list allegations which are not substantiated with evidence from the record. As such, the Court cannot

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<sup>12</sup> *Flamer v. State*, 585 A.2d 736, 747 (Del. 1990).

<sup>13</sup> *Cuff v. State*, 931 A.2d 436 (Del. 2007) (TABLE).

<sup>14</sup> *Younger v. State*, 580 A.2d 552, 555- 556 (Del. 1990).

<sup>15</sup> Def.'s Mot. at 3.

<sup>16</sup> *State v. Vasquez*, 2001 WL 209867, at \*1 (Del. Super. Jan. 31, 2001).

provide relief and Defendant's prosecutor misconduct and due process violation claims are both dismissed.

6. Defendant's remaining claim raises the issue of ineffective assistance of counsel. Defendant's ineffective assistance counsel claim includes the following: "failure to cite and address noted [B]rady violation," "failure to request evidentiary hearing," "failure to request and argue suppression requirements," and "failure to preserve issue of appellant [information]." <sup>17</sup>

7. To prevail on a claim for ineffective assistance of counsel, a defendant must meet the two-part test set forth in *Strickland v. Washington*.<sup>18</sup> First, the Defendant must establish that "counsel's representation fell below an objective standard of reasonableness." <sup>19</sup> Second, the Defendant must show that counsel's performance was prejudicial to his defense. <sup>20</sup> This requires a showing that a reasonable probability exists that the outcome of the proceeding would have been different but for counsel's error.<sup>21</sup> As to the first prong, whenever evaluating the conduct of counsel, the Court must indulge "a strong presumption that counsel's conduct was professionally reasonable."<sup>22</sup> As to the second prong, a reasonable

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<sup>17</sup> Def.'s Mot. at 2.

<sup>18</sup> *Strickland v. Washington*, 446 U.S. 668, 694 (1984).

<sup>19</sup> *Strickland*, 446 U.S. at 688.

<sup>20</sup> *Id.* at 687.

<sup>21</sup> *Id.* at 694; *see also Wright v. State*, 608 A.2d 731 (Del. 1992).

<sup>22</sup> *Strickland*, 446 U.S. at 689.

probability means “a probability sufficient to undermine confidence in the outcome” of the proceeding.<sup>23</sup> The defendant must make concrete allegations of ineffective assistance, and substantiate them, or risk summary dismissal.<sup>24</sup>

8. The Court finds that Defendant has not presented any basis upon which this Court can provide relief. In spite of numerous opportunities to state the details of his ineffective assistance claims, the Defendant has not filed a response to his counsel’s affidavit or articulated any argument in support of his claims. Instead, the Defendant merely provides a laundry list of allegations of ineffective assistance of counsel which were contained in his original petition filed in 2008.<sup>25</sup> Furthermore, the Defendant has presented no argument that his counsel’s representations fell below an objective standard of reasonableness, nor does the Defendant show he was prejudiced by the conduct of his counsel. The affidavit of Defendant’s trial counsel reflects that he is unaware of any Brady material withheld by the State; he is unaware of facts that would have provided a good faith basis to file a suppression motion; and that he believes that he appropriately acted to preserve trial issues that would perhaps provided a basis for an appeal of the Defendant’s conviction. Because the Defendant

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<sup>23</sup>*Id.* at 694.

<sup>24</sup> *Ducote v. State*, 2007 WL 1301085, at \*1 (Del. May 4, 2007) (TABLE) (citing *Younger*, 580 A.2d at 556).

<sup>25</sup> *Gattis v. State*, 697 A.2d 1174, 1178-79 (Del. 1997) (citing *Wright*, 671 A.2d at 1356; *Younger*, 580 A.2d at 556).

has failed to rebut his counsel's affidavit, the Court has no choice but to dismiss the Defendant's ineffective assistance of counsel claim.

9. For the foregoing reasons, Defendant's *pro se* Motion for Postconviction Relief is hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.